No. 94-1021

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In The

Supreme Court of the United States

October Term, 1994

RONALD WHITE and JODI WHITE,

Petitioners,

v.

WILLIAM MOULDER, in his official capacity as Chief of Police of the City of Des Moines, Iowa; RONALD FOSTER, individually and in his official capacity as Police Officer of the City of Des Moines, Iowa; DAVID NOEL, individually and in his official capacity as Police Officer of the City of Des Moines, Iowa; CITY OF DES MOINES, IOWA; JAMES RAMEY, individually and in his official capacity as an Assistant Polk County Attorney,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For the Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER A DEFENDANT WHO IS ACQUITTED IS PRECLUDED FROM CLAIMING DAMAGES BASED ON THE THEORY THAT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL HAS BEEN VIOLATED.

II. WHETHER A PROSECUTOR IS ENTITLED TO ABSOLUTE PROSECUTORIAL IMMUNITY AFTER HE KNOWINGLY FAILED TO PRODUCE EXCULPATORY EVIDENCE IN VIOLATION OF A COURT ORDER.

PARTIES TO THE PROCEEDINGS

Ronald White, is a police sergeant with the City of Des Moines, Iowa, who was terminated from employment on May 31, 1991, after a hearing on charges of criminal misconduct. White was charged with stealing items of evidence from a drug investigation scene. The items included cash and a winning lottery ticket. White has since been reinstated as a sergeant for the City of Des Moines Police Department. Prior to his dismissal he was in charge of the narcotics squad officers' team.

Jodi White, is the wife of Ronald White. She was found to have signed and cashed the missing lottery ticket a day after it was wrongly removed from the drug investigation scene.

William Moulder, is the Chief of Police for the City of Des Moines, Iowa.

Ronald Foster is a police officer for the City of Des Moines, Iowa. **David Noel** is a sergeant with the City's Police Department. The officers were both summoned to take possession of and to log money confiscated at the drug investigation scene. The officers noticed that they had mistakenly failed to record two bills, documented their mistake and immediately reported the mistake to the proper authorities. The officers do not function as prosecutors.

PARTIES TO THE PROCEEDING – Continued

City of Des Moines is a municipal corporation in the State of Iowa.

James Ramey is an Assistant Polk County Attorney for the State of Iowa. His duties include executing prosecutorial functions.

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OPINIONS BELOW

The United States Court of Appeals for the Eighth Circuit issued an order denying White's Petition for rehearing and rehearing en banc. This order is unreported and is included in the Petitioner's Appendix. The Eighth Circuit Court of Appeals' decision affirming the District Court's finding in favor of the Defendants is dated September 2, 1994 and is included in the Petitioner's Appendix. This opinion is cited at 30 F.3d 80 (8th Cir. 1994). The United States District Court for the Southern District of Iowa granted summary judgment to Defendants, Foster and Noel, on the plaintiff's constitutional claim. This decision is dated January 19, 1993 and is included in the Petitioner's Appendix. Further, on July 21, 1992, Defendant, Assistant Polk County Attorney James Ramey was granted summary judgment by the United States District Court for the Southern District of Iowa.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on July 14, 1994. On August 19, 1994, the Eighth Circuit denied the Plaintiff's Petition for Rehearing and Suggestion for Rehearing En Banc. The Plaintiff seeks certiorari review by this Court and claims jurisdiction pursuant to 28 U.S.C. § 1254(1). Certiorari review is inappropriate because the case does not involve an important question of law which should be settled by this Court. The Eighth Circuit's decision is based on well

established law and does not present a problematic conflict among the circuits.

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

1. Facts Pertinent to the Petition

The Plaintiff omits relevant facts necessary for review of his Petition for Certiorari. The omitted facts are undisputed and stated below.

On November 8, 1990 Petitioner Ronald White supervised the narcotic squad officers who conducted a search of the residence of a drug dealer. During the search, both cash and narcotics were seized. Photographs were taken of the evidence and later found to be critical in a criminal charge brought against the Petitioner.

Upon close review of the photographs, it was found that a winning lottery ticket ($50.00) and a $100 bill had been photographed at the scene but had not been listed on the evidence log nor placed in evidence at trial.

An investigation uncovered the fact that Jodi White, the wife of Petitioner, Ronald White, signed the missing lottery ticket and cashed it on November 9, 1990, the day after it was wrongly removed from the scene.

Trial judge Bergeson ordered the cash in evidence be counted and a log of the serial numbers be made. Sergeant Noel and Officer Foster were summoned to Judge Bergeson's chambers to take possession of the trial exhibit containing $1,000 cash. While preparing the list of serial numbers requested, Sergeant Noel and Officer Foster mistakenly listed the serial number of one $50 bill twice and failed to list the serial numbers of two twenty dollar bills and one ten dollar bill. This mistake was discovered the same day by the Police Identification staff.

Sergeant Noel and Officer Foster were notified immediately of the mistake and promptly brought the mistake to the attention of the proper authorities. The officers informed Assistant County Attorneys Steve Foritano and James Ramey as well as Judge Bergeson and his court attendant, Judy Proske, of the mistake. The officers also documented the mistake in a field note. The Polk County Attorney's Office did not provide copies of the field note or photographs to the Petitioner's counsel during the discovery phase of the Petitioner's criminal trial.

Subsequently, Petitioner Ronald White was acquitted of the criminal charges brought against him.

While City of Des Moines Police Chief William Moulder and the City of Des Moines are named in the petitioner's appeal and petition for writ of certiorari, White has not stated claims against them. The United States Court of Appeals for the Eighth Circuit stated that because issues as to Defendants, Moulder and the City of Des Moines were not specifically raised in White's brief, they would not be addressed. (Petitioner's Brief A.4).

2. Inaccurate Statements in the Petition

The Petitioner's statement of facts relevant for review and his stated reasons for this Court to grant certiorari contain inaccurate statements of fact and law and are misleading in several respects.

As noted previously, the Petitioner omits pertinent facts that are necessary for review of his Petition for Writ of Certiorari. First, the Petitioner fails to note that a police investigation and his wife's own testimony established that his wife (Jodi White) cashed a winning lottery ticket wrongfully removed from the drug investigation scene and involved in this case.

Second, the Petitioner chooses to omit the fact that Officers Noel and Foster promptly notified the presiding judge and the Polk County Attorney's Office regarding arguably exculpatory evidence that was in their possession.

Third, the Petitioner misstates the law on exculpatory evidence and provides misleading reasons for this Court to grant certiorari. The Petitioner makes the assertion that he was denied a fair trial because Officers Noel and

Foster did not turn over arguably exculpatory evidence to his counsel. In making this assertion the Petitioner misleads the court by placing the police officers in prosecutorial roles. The Petitioner does not address well established law that prosecutors, not police officers, have a duty to disclose exculpatory evidence to opposing counsel.

REASONS FOR DENYING THE PETITION

I. A DEFENDANT WHO IS ACQUITTED IS PRECLUDED FROM CLAIMING DAMAGES BASED ON THE THEORY THAT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL HAS BEEN VIOLATED.

The issue raised in the Petition regarding the fairness of White's trial does not raise an important constitutional question to justify consideration by this Court. The record reveals that the Plaintiff has already made use of all avenues appropriate for review of his § 1983 constitutional claim.

The District Court and U.S. Court of Appeals for the Eighth Circuit reviewed White's constitutional claim and properly found that White had not established that a § 1983 claim exists.

The Petitioner argues that under *Haupt v. Dillard,* his acquittal does not preclude a finding that his right to a fair trial has been violated. 17 F.3d 285 (9th Cir. 1994). However, the clear weight of authority is with *Christman v. Hanrahan* and its progeny which holds to the contrary. 500 F.2d 65 (7th Cir. 1974).

The question presented in *Christman* is quite similar to those presented by the present situation. In *Christman*, the plaintiff brought a constitutional claim against a prosecutor and a policeman for an alleged violation of his constitutional rights. The plaintiff argued that his right to a fair trial was impaired because arguably exculpatory evidence was not brought to his attention before trial. The plaintiff was acquitted by a jury after only ten minutes of deliberation. The court held in the *Christman* case that because the plaintiff was acquitted, his trial was not fundamentally unfair and thus did not warrant a cause of action under § 1983. *Christman v. Hanrahan*, 500 F.2d 65, 67-68 (1974). This finding has been followed in subsequent cases. *United States v. Marrero*, 516 F.2d 12, 15 (7th Cir. 1975); *Schiavone Construction Co. v. Merola*, 678 F.Supp. 64, 66-67 (S.D. N.Y. 1988); *Jones v. City of Chicago*, 639 F.Supp. 146, 151 (N.D. Ill. 1986). Thus contrary to the Petitioner's assertion, the Eighth Circuit's decision to follow the holding in *Christman* does not create an intolerable conflict between circuits. (Petitioner's Petition p. 6). The clear weight of the authority is with *Christman*.

Even if this court finds the *Haupt v. Dillard* case persuasive, another reason remains for refusing to grant White's Petition for writ of certiorari. White's Petition should be denied because Officers Foster and Noel satisfied their constitutional duty to turn over arguably exculpatory information when they immediately disclosed the information to Assistant Polk County Attorney, James Ramey. The officers did not have a constitutional duty to disclose the information to the Petitioner as well. *Walker v. City of New York*, 974 F.2d 293, 299 (2d. 1992). See also *Campbell v. Maine*, 632 F.Supp. 111, 121 (D.Me. 1985), *aff'd*,

787 F.2d 776 (1st Cir. 1986). When faced with the question of whether a police officer has a duty to disclose arguably exculpatory evidence to the defense, the court in *Walker v. New York* held that they do not. The court noted that "a rule requiring the police to make separate, often, difficult and perhaps conflicting disclosure decisions would create unnecessary confusion." *Id.* The court further noted that where the police have shared all exculpatory evidence with the prosecutors, the claimant has failed to state a constitutional claim against the police for suppression of exculpatory evidence. 974 F.2d 293, 299.

Based upon this principle, the Petitioner's constitutional claim against the police must once again fail. Because Officers Foster and Noel were not under a constitutional duty to disclose exculpatory evidence to the Petitioner, the lower court properly decided that White does not have a cause of action under 42 U.S.C. § 1983. Under *Baker v. McCollan*, the plaintiff has not satisfied the first inquiry of a § 1983 suit; that he has been deprived of his constitutional right to a fair trial. 443 U.S. 137, 140 (1979).

Thus, even if this Court finds *Haupt v. Dillard* persuasive, White's Petition for writ of certiorari should still be denied. Officers Noel and Foster were not bound to disclose exculpatory evidence to White's counsel and therefore could not have violated the Petitioner's right to a fair trial.

II. IS PROSECUTOR ENTITLED TO ABSOLUTE PROSECUTORIAL IMMUNITY AFTER FAILING TO PRODUCE EXCULPATORY EVIDENCE IN VIOLATION OF A COURT ORDER.

Question two will not be addressed in this Brief in Opposition as it only relates to Assistant Polk County Attorney, James Ramey. Respondents Noel and Foster are not prosecutors and therefore need not address this question.

CONCLUSION

Based on the above stated facts, law and reasoning, the Respondents respectfully request that this Court deny the Plaintiff's Petition for Writ of Certiorari, and assess the costs to the Plaintiff.

Respectfully submitted,

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